

1 J. THOMAS SUSICH, ESQ.  
Nevada State Bar No. 898  
2 STATE OF NEVADA, Department of  
Employment, Training & Rehabilitation (DETR)  
3 Employment Security Division (ESD)  
500 East Third Street  
4 Carson City, NV 89713  
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*Attorney for ESD*

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

9 JAMES DELORIE, an individual,

10 Plaintiff,

11 vs.

12 PARBALL CORPORATION, d.b.a. BALLY'S  
PARIS GAMING, a Nevada Corporation,  
13 INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 501, CALIFORNIA, a  
14 collective bargaining unit,

15 Defendants.

CASE NO. 2:09-CV-00933-RLH-LRL

**ESD'S OPPOSITION TO  
PLAINTIFF'S MOTION TO COMPEL**

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17 COMES NOW, J. Thomas Susich, Esq., on behalf of the Employment Security  
18 Division (ESD) of the Nevada Department of Employment, Training and Rehabilitation, and  
19 opposes Plaintiff's Motion to Compel, as follows:

20 ESD is a state agency which is charged by Nevada law with the administration of  
21 unemployment insurance benefits in the state. Nevada employers pay contributions which are  
22 placed in an administrative trust fund from which all benefits are paid. All administrative  
23 functions of ESD, however, are federally funded. ESD is required by federal law to establish  
24 certain procedures regarding the administration of unemployment insurance benefits within the

1 state. Included in these requirements is NRS 612.265 which restricts access to highly sensitive  
2 information about Nevada citizens and their employers.

3 The State of Nevada and ESD, as the applicable agency, are subject to the  
4 mandates of federal statutory and regulatory law regarding the administration of Nevada's  
5 unemployment compensation system. 20 CFR § 603.7 states as follows:

6 Except as provided in paragraph (b) of this section, when a  
7 subpoena or other compulsory process is served upon a State UC  
8 agency or the State, any official or employee thereof, or any  
9 recipient of confidential UC information, which requires the  
10 production of confidential UC information or appearance for  
11 testimony upon any matter concerning such information, the State  
12 or State UC agency or recipient must file and diligently pursue a  
13 motion to quash the subpoena or other compulsory process if other  
14 means of avoiding the disclosure of confidential UC information  
15 are not successful or if the court has not already ruled on the  
16 disclosure. Only if such motion is denied by the court or other  
17 forum may the requested confidential UC be disclosed, and only  
18 upon such terms as the court or forum may order, such as that the  
19 recipient protect the disclosed information and pay the State's or  
20 State UC agency's costs of disclosure.

21 The only exceptions as stated in the regulation are the existence of a precedential  
22 decision of the court regarding such a request, or if the request is received from a state or federal  
23 governmental agency permitted to receive the information without a subpoena. 20 CFR §  
24 603.7(b)(1) and (2).

25 Nevada's Unemployment Compensation laws are governed by Section 303 of the  
26 Social Security Act. [42 U.S.C. 503.] Section 303(a)(1) requires the states to comply with the  
27 directives of the Secretary of Labor regarding the administration of its UC system consistent with  
28 the Federal Unemployment Tax Act [FUTA]. Section 303 of the SSA also requires the states to  
29 adopt laws which will insure that information obtained by the state UC system be safeguarded  
30 from disclosure to persons not authorized by Section 303, FUTA and the directives of the  
31 Secretary of Labor.

1 Nevada, in compliance with federal law, has adopted NRS 612.265 which  
 2 provides that no claimant or employer may have access to information from Nevada's UC  
 3 system for any purpose other than an appeal under NRS Chapter 612. NRS 612.265(2). In this  
 4 case, the plaintiff has served a subpoena duces tecum on the Administrator of ESD demanding  
 5 the production of: "Documents and Objects relating to James Delorie's Unemployment Appeal,  
 6 Case No. V-08-A-12109, including tape/transcript of proceedings." Mr. Delorie has exhausted  
 7 all appeals under NRS Chapter 612; and therefore, does not require the information for any  
 8 pending appeal under the statute. By Nevada law, as mandated by federal law, he is not  
 9 permitted to have said information.

10 Plaintiff argues in his Motion to Compel that a decision issued in 1996 by this  
 11 Court requires Nevada ESD to ignore Nevada law and provide documents from its files to any  
 12 party subpoenaing documents pursuant to an action filed in the federal district court. While the  
 13 case of *Menses v. United States Postal Service*, 942 F. Supp. 1320 (1996), may be considered a  
 14 precedential case regarding the disclosure of confidential ESD information, it presents two  
 15 problems:

16 1. The case does not address the fact that Section 303 of the SSA and regulations  
 17 adopted by the Secretary of Labor mandate Nevada to adopt NRS 612.265. In a publication  
 18 submitted to Nevada ESD by the United States Department of Labor, said agency states:

19 The relevant Federal law provision is Section 303(a)(1), SSA,  
 20 which has been interpreted to prohibit disclosure of claimant and  
 21 employer UI information on the basis that this information is  
 22 confidential and disclosure would, among other things, impede the  
 23 proper and effective administration of the UI program. While  
 24 States are free to disclose claimant and employer UI information to  
 public officials in the performance of their duties, to agents or  
 contractors of public officials, or on the basis of informed consent,  
 employment/wage information is otherwise confidential and may  
 not otherwise be disclosed. (See 20 CFR Part 603 and UIPLs 34-  
 97 and 21-99.)

1           In other words, while NRS 612.265 is technically a “state law,” it is a law which  
2 the federal government has required be adopted and administered by a federally funded state  
3 agency which includes a requirement to vigorously oppose the production of documents from its  
4 records to persons not specifically authorize to receive them under the federal directives set forth  
5 in Section 303 of the SSA. ESD receives in excess of ten subpoenas a month from the federal  
6 district court in Nevada. NRS 612.265 is not just a state law. It is, in fact, a law mandated by  
7 federal law.

8           2. No less problematic is the fact that ESD has no way of determining whether  
9 state or federal law will supply the “rule of decision” in the case from which a subpoena arises.  
10 The Court in *Menses, supra*, pointed out that Rule 501 of the Federal Rules of Evidence does not  
11 permit discovery of state privileged materials in cases arising under *Erie R. Co. v. Tompkins*, 304  
12 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1983), which includes most diversity actions.

13           The subpoena served upon ESD in this case, as in all cases, contains no  
14 information from which ESD can discern whether the case falls within the exception adopted by  
15 the court in *Menses*. Thus, ESD, which is not a party, would, when served with a federal  
16 subpoena, be expected to know what law will supply the “rule of decision” in the case in order to  
17 determine whether to comply with the subpoena. It is submitted that expecting ESD to do this is  
18 unreasonable and subjects ESD to an undue burden in violation of FRCP 45.

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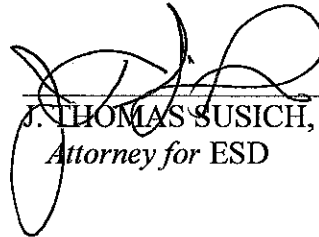
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1 It is requested that this Court issue a decision specifically providing guidance to  
2 ESD regarding responses to federal district court subpoenas. ESD asks that the Court address the  
3 application of *Menses* in light of the federal law mandating the adoption of NRS 612.265; and, if  
4 the Court reaffirms the reasoning in *Menses*, provide ESD with a mechanism, short of filing a  
5 motion to quash in every case, by which ESD can determine whether the case in question  
6 requires the production of confidential information in violation of the federally mandated state  
7 law.

8 **DATED** this 9<sup>th</sup> day of June, 2010.

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11 J. THOMAS SUSICH, ESQ.  
12 *Attorney for ESD*  
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**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I electronically filed the foregoing ESD'S OPPOSITION TO MOTION TO COMPEL; and as a consequence thereof, the following parties to this action will be served via the ECF electronic filing system:

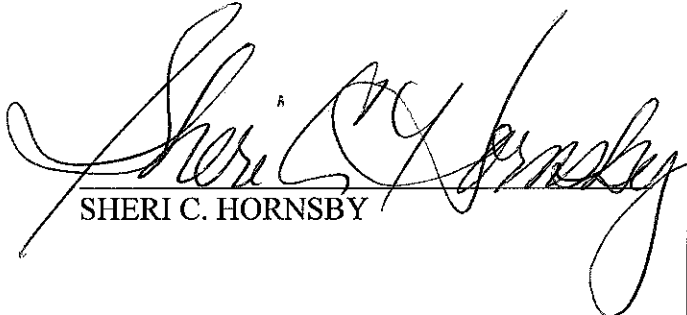
Jeffrey A. Dickerson, Esq.

Patrick H. Hicks, Esq.  
Veronica Arechederra Hall, Esq.

Lewis N. Levy, Esq.  
Rudy Balderama, Esq.

Thomas F. Pitaro, Esq.

**DATED** this 9<sup>th</sup> day of June, 2010.

  
SHERI C. HORNSBY